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No. 85-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, *et al.*,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Eighth Circuit

REPLY BRIEF OF PETITIONERS

JOHN O'B. CLARKE, JR.

HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Petitioners
United Transportation
Union, *et al.*

Date: March 20, 1986

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This reply brief is respectfully submitted by petitioners United Transportation Union, *et al.* [hereinafter, "UTU"], in response to several arguments raised by respondents Missouri-Kansas-Texas Railroad [hereinafter, "MKT"] and Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] in their opposition to this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the decision and judgment of that court in *Missouri Pac. R.R. v. UTU,* 782 F.2d 107 (8th Cir. 1986).

Although respondents MKT and ICC oppose this request for a writ of certiorari, a close examination of their responses shows that there is an urgent need for this Court to grant the writ and either to review or to vacate summarily the Eighth

Circuit's judgment in this case.[1] Both the MKT and the ICC acknowledge the close relationship between the decisions below and the decision by the D.C. Circuit in *Brotherhood of Locomotive Engineers v. ICC* [hereinafter, "*BLE v. ICC*"], 761 F.2d 714 (D.C. Cir. 1985), *pets. for cert. pending*, Sup. Ct. Nos. 85-792, *et al.*, but they nevertheless argue in this case that the writ should not be granted. Petitioners respectfully submit that respondents' arguments are without merit and do not justify a denial of this writ.

I. Respondents' Arguments Show The Need For This Court To Review The Eighth Circuit's Judgment

Respondent MKT opposes this petition because, in its opinion, the lower courts in this case correctly decided the issues presented. However, to support its conclusion, respondent makes an argument based primarily on *Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37 (1971), which was not accepted or even discussed by the lower courts as a justification for their decisions. Moreover, that argument stretches this Court's decision in the *Nemitz* case well beyond its facts or its relevant holding (*i.e.*, rail labor and management may not abrogate by negotiation employee protective conditions imposed by the ICC) to such a degree that *Nemitz*, in MKT's view, now stands for an entirely different proposition—*i.e.*, rail labor may not require rail carriers, before they accept conditions imposed by a permissive order of the ICC, to negotiate whether they will accept that order or whether the employee protections imposed by that order should be supplemented, not abrogated. If *Nemitz* stands for that proposition, which petitioners submit it does not, the apparent conflict between that view of *Nemitz* and this Court's decision in *Order of Railroad Telegraphers v. Chicago & North Western R.R.*, 362 U.S. 330 (1960), requires that this petition be granted.

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[1] Initially, petitioners requested that this Court grant the writ in this case only if it also granted the petitions in Nos. 85-792, *et al.* After the Eighth Circuit issued its decision on January 15, 1986, which relied upon the two ICC decisions vacated by the District of Columbia Circuit in *BLE v. ICC, infra*, petitioners modified their petition to request that it be granted even if this Court denied the petitions in Nos. 85-792, *et al.* Petitioners requested in their supplemental pleading that in the event this Court denied the petitions from the D.C. Circuit case, the Eighth Circuit's judgment be vacated summarily.

Respondent ICC's arguments, while less creative, fare no better, for the Commission, in asserting that the merits of this case do not warrant plenary review, totally ignores the clear conflict between the decisions below and the Fifth Circuit's decision in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1962), *cert. denied,* 371 U.S. 952 (1963). Although the *Texas & New Orleans* court, as respondent MKT emphasized, did add a caveat to its decision that it would have to conclude that the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.,* was "preempted" by 49 U.S.C. § 11341(a) if it found that the ICC's authority under Section 11343 was being frustrated by an application of the anti-injunction Act to a particular case (307 F.2d at 158), the court did not find such a conflict in that case even though, as here, rail management relied upon an ICC order as justification for their refusal to bargain.[2] Indeed, that case clearly stands for the proposition that a railroad may not, as occurred in this case, use the ICC's approval processes as a means to modify unilaterally existing employee working conditions. 307 F.2d at 158. Moreover, the *Texas & New Orleans* case also shows that in cases, such as the one at bar, where rail labor has been denied a meaningful opportunity to negotiate work rule changes, Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), does not act to restore to the federal courts the jurisdiction which the Norris-LaGuardia Act withdrew; in other words, the lack of federal court labor-injunctive jurisdic-

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[2] Respondent ICC asserts that petitioners appear to acknowledge that the MKT's crewing proposal was a material term of the trackage rights condition imposed by the ICC's merger order. ICC Memo. at 4 n.1. Petitioners have made no such concession, and indeed, the validity of the concept of "material term" of a proposed financial transaction is an issue in dispute, for petitioner UTU has posed that question as its second issue in its cross-petition in No. 85-983. Moreover, the label of "material term" is the ICC's response to the Fifth Circuit's decision in *City of Palestine v. United States,* 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978), and is an effort to avoid the necessity component of § 11341(a). A comparison of the MKT's crewing provision with that of the Rio Grande's shows that labeling a provision as a "material term" under the MKT's and ICC's view of § 11341(a) allows the carrier to establish unilaterally new working conditions. The Fifth Circuit rejected this view of § 11341(a) in the *Texas & New Orleans* case.

tion is not a "restraint" upon a carrier's ability to effectuate an ICC-approved financial transaction. 307 F.2d at 156.

Respondent ICC has not only ignored the *Texas & New Orleans* case, but it has also asserted that no court, to its knowledge, has addressed the interrelationship between the Norris-LaGuardia Act and the ICC's jurisdiction to resolve labor disputes in connection with rail mergers. ICC Memo. at 7. That assertion is incorrect for the *Texas & New Orleans* court has addressed this issue. In that case, the Fifth Circuit concluded that an ICC unification order was not violated when rail labor insisted that the railroads bargain with them over changes in working conditions proposed to the ICC and, according to the railroads, implicitly approved by the ICC when that agency approved the unification proposal. 307 F.2d at 159. Moreover, the Fifth Circuit concluded in the *Texas & New Orleans* case that the Norris-LaGuardia Act was not superseded by the ICC's jurisdiction to impose employee protective conditions.

As petitioners explained before (Pet. at 18-23), the *Texas & New Orleans* case is clearly consistent with prior decisions by this Court emphasizing that the Norris-LaGuardia Act must be broadly construed so as to protect the employee rights which Congress sought to guard in enacting that legislation. *E.g., Order of Railroad Telegraphers v. Chicago & North Western R.R., supra,* 362 U.S. at 335-36. Moreover, this Court has never sanctioned the implied repeal of that anti-injunction Act by a non-labor Act of Congress. *Id.* at 339. Nevertheless, the decisions below in this case rejected the *Texas & New Orleans* holdings and "accommodated" the Norris-LaGuardia Act to a non-labor statute—the Interstate Commerce Act. While respondent ICC may argue that such an accommodation is correct, the validity of that accommodation is immaterial at this point, for the relevant question is whether that accommodation is such a marked departure from past precedent that it warrants plenary review by this Court. In view of both the conflict in the circuits over this issue and prior decisions by this Court on the scope of the Norris-LaGuardia Act, petitioners respectfully submit that plenary review of the Eighth Circuit's judgment by this Court is clearly warranted, if this Court grants the petitions in Nos. 85-792, *et al.*

Respondent MKT in its Supplemental Brief and respondent ICC also assert that petitioners' constitutionally protected rights to picket and to withdraw their services from their employer are subordinated to the rights of the public and that such strike activity is illegal in this case because it violates an order of the ICC. MKT Sup. Br. at 5; ICC Memo. at 6-7. That assertion, which was not advanced by the Eighth Circuit as a justification for its decision, is nevertheless consistent with that court's reasoning, and shows the urgent need for this Court to review this case if it also reviews the *BLE v. ICC* decision. Although respondents try, they are unable to refer this Court to any authority which squarely or even inferentially holds that rail labor can be barred from bargaining or from using its constitutionally proteced right to strike in an effort to require a railroad to negotiate changes in working conditions, even if those changes are arguably in response to a permissive order of the ICC. Indeed, the *Texas & New Orleans* case and this Court's decision in *Order of Railroad Telegraphers v. Chicago & North Western R.R., supra,* require a conclusion contrary to that urged by respondents and reached below.

II. Respondent ICC's Belief That A Consolidated Review Of Both the D.C. Circuit's And the Eighth Circuit's Decisions Would Be Too Complex, Is Without Merit

Respondent ICC also asserts that this Court should not accept review of the Eighth Circuit's judgment because a consolidated review of that judgment with the D.C. Circuit's decision would be too complicated. ICC Memo. at 2-3. That argument, petitioners respectfully submit, is nonsense. Everyone involved in these cases recognizes both the importance of the issues presented and the manner in which the two cases are inextricably entwined. Petitioners have asserted, and no one has, or for that matter can, dispute the fact that the "strike" related issues—*i.e.,* those presented by this petition—necessarily flow from an acceptance of the ICC's implicit position in No. 85-792 that its order supersedes the Railway Labor Act, 45 U.S.C. § 151, *et seq.* If the dispute over rail labor's rights in connection with employment changes which are arguably related to an ICC-approved transaction, is to be

settled, it is crucial to rail labor that it be settled fully and finally as soon as possible.[3] That can be accomplished only by a consolidated review of both *BLE v. ICC* and the Eighth Circuit's decision in this case. Such a review will not present too complex of a case because the various issues logically flow from one to the other. Moreover, even if the consolidated case is complex, it is absurd to assert, as respondent ICC implies, that this Court does not have the capacity to handle "complex" cases.

Respondent ICC seeks to support its piecemeal review approach by asserting that a ruling on the issues presented by its petition in No. 85-792, even though not dispositive of the "strike" related issues, "should at least inform" a subsequent resolution of those issues. ICC Memo. at 3-4. That assertion is incorrect, for whether or not the immunity provisions of Section 11341(a) are self-executing does not in any way address the issues of whether such an immunity acts to relieve rail labor of the restraints which the Railway Labor Act places on its right to strike, or whether the Norris-LaGuardia Act's withdrawal of equity jurisdiction from federal courts is a restraint which may be overridden by Section 11341(a). Those are separate issues which must be resolved before this crisis in rail labor relations can be settled. At present, those issues are in doubt because of the conflicts between the circuits and between the Eighth Circuit's judgment and prior decisions by this Court.

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[3] Petitioners have been authorized to state that the Railway Labor Executives' Association [hereinafter, "RLEA"] supports their request for a writ of certiorari in this case. RLEA, as petitioner UTU explained in its cross petition No. 85-983 at 16, is a voluntary association of the chief executive officers of 19 standard labor organizations which collectively represent virtually all organized rail employees today. A list of RLEA's member organizations is attached as Appendix B to the UTU's cross-petition in No. 85-983.

CONCLUSION

Petitioners, fully supported by rail labor, respectfully urge that this Court grant their petition in this case as stated at page 9 of petitioners' Supplemental Brief.

Respectfully submitted,

JOHN O'B. CLARKE, JR.
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Petitioners

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